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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-10

THE UNIVERSITY OF TENNESSEE, *et al.*,

Petitioners,

v.

RITA SANDERS GEIER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners, The University of Tennessee, its President, Edward J. Boling, the Board of Trustees of The University of Tennessee, the present members of the Board of Trustees and its Vice-Chairman, respectfully pray that a Writ of Certiorari issue to review the decision rendered in this cause on April 13, 1979, by the United States Court of Appeals for the Sixth Circuit. In that decision, the Court of Appeals affirmed a decision of the United States District Court for the Middle District of Tennessee ordering that The University of Tennessee at Nashville and Tennessee State University, two institutions of higher

education located in Nashville, Tennessee be merged into a single institution.

The Respondents in this matter fall into the following categories:

(a) Rita Sanders Geier, Patrick J. Gilpin, Ernest Terrell, Harold Sweatt and Phillip Sweatt, Individually and as Next Friend of Phillip Sweatt, were the original Plaintiffs who filed this action in the District Court and were Appellees in the Court of Appeals.

(b) The United States of America intervened as a Plaintiff subsequent to the filing of this suit and was an Appellee in the Court of Appeals.

(c) The Plaintiffs, Raymond Richardson, Jr. and Hughland Richardson, infants by their Parent and Next Friend Raymond Richardson; Stanford Strong, Jr., Godfrey Strong, and Jeff Strong, infants by their Parent and Next Friend Stanford Strong; Derrick Harris, infant, by his Guardian and Next Friend Mrs. Claudia Adams; Osmond Robinson, LaNell Robinson, Vanetta Robinson and Jared Robinson, infants, by their Parent and Next Friend James Robinson; Rutherford Overton, Roscoe Overton, Jr., and Marva Overton, infants, by their Parent and Next Friend Roscoe Overton; David L. Acey, II, and Carolyn M. Biven, infants, by their Parent and Next Friend Mrs. Yvonne B. Acey; Joseph C. Simmons, Bryan E. Simmons, Alexis Fay Simmons and Dara Kaye Simmons, infants, by their Parent and Next Friend Joseph S. Simmons; Darryl Buford, Gerald Buford, Rhonda Buford and Terryl Buford, infants, by their Parent and Next Friend Frank A. Buford; Fred Bell, John Bell and Phillip Bell, infants, by their Parent and Next Friend Rev. Ezekiel Bell; Alice Vanessa Coleman, infant, by her Parent and Next Friend Mrs. Juanita Coleman; Audrey Fletcher and Theodore R. Fletcher, infants, by their Parent and Next Friend Mrs. Beatrice Fletcher; Malissa Michelle Moore, infant, by her Parent and Next Friend Tyrant Moore; Kathryn L. J. Sanford; Desaree Bowers and Montrice Bowers, infants, by their Parent and Next Friend Mrs. Kathryn I. Bowers; Vasco A. Smith, III, infant by his Parents and Next Friends Vasco A. Smith, Jr., and Mrs. Maxine Smith; Angela Mapp, Tony Mapp, Alice Mapp and Ivanette Mapp, infants, by their Parent and Next Friend James R. Mapp; Carlmon Payne, Vincent Payne, Frank Payne and Pitt Payne, infants, by their Parent and Next Friend Mrs. Janice Payne; Cheryl Johnson and Carl E. Johnson, Jr., infants, by their Parent and Next Friend Carl E. Johnson, Sr.; Juvetia Adams and Yulunda Adams, infants, by their Parent and Next Friend Foster L. Adams; Rickie L. Pearson; Mary Ann Myles; Mrs. Barbara Drake; Donald Campbell; Sterlin Adams; Harold J. Smith; Mrs. Joan Elliott; Mrs. Sammye J. Wynn; Raymond Richardson; Robert Bozeman; Dwight Bonds; Roscoe Overton; Joseph S. Simmons; George A. Dowdy; Rev. Ezekiel Bell; Minerva J. Johnican; Stanford Strong; Robert Smith; Herman E. Jackson; Mrs. A. Leola Barton; Irvin L. Willis; Foster L. Adams; Mrs. Beatrice Fletcher; Mrs. Juanita Coleman; Mahlon Griffith; Mrs. Kathryn Bowers; Mrs. C. E. McGruder; Mrs. Claudia Adams; Warren N. Moore; James Robinson; Mrs. Yvonne B. Acey; Frank A. Buford; Tyrant Moore; Mrs. Janice Payne; Charles E. Johnson; Vasco A. Smith; Mrs. Maxine Smith; James R. Mapp; Rev. Alfred DeWayne Hill; Mrs. Mary Lee Seymour; Mrs. Verneidl Hines; Mrs. Clyde T. Bardwell; Mrs. Gwendolyn Kiles; Rev. Samuel B. Kiles; Walter Evans; Thomas J. Troope; Harold A. Cohn, were granted leave to intervene as Plaintiffs in the District Court and did intervene and were Appellees in the Court of Appeals.

(d) The Board of Regents, State University and Community College System of Tennessee, were Defendants in the District Court but were Appellees in the Court of Appeals and should be considered as Respondents in this matter.

(e) Honorable Ray Blanton, The Governor of the State of Tennessee, was a Defendant in this matter and an Appellee in the Court of Appeals. Honorable Lamar Alexander is now Governor.

OPINIONS AND ORDERS BELOW

The initial Opinion of the District Court in this matter is reported as *Sanders v. Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968) and is included in the separate Appendix filed herewith at 1a.

A subsequent Opinion of the District Court is reported as *Geier v. Dunn*, 337 F.Supp. 573 (M.D. Tenn. 1972) and is included in the Appendix at 13a.

In an Order, dated April 19, 1974, the District Court ordered that the University of Tennessee at Nashville terminate its graduate education program and further ordered that, in the future, such program be offered exclusively at Tennessee State University. That Order is included in the Appendix at 33a.

The Opinion of the District Court ordering the merger of Tennessee State University and The University of Tennessee at Nashville, from which an appeal was taken by these Petitioners to the United States Court of Appeals for the Sixth Circuit, is reported as *Geier v. Blanton*, 427 F.Supp. 644 (M.D. Tenn. 1977) and is included in the Appendix at 37a.

The Order of the District Court, directing that the Plan of Merger filed by the Respondent, Board of Regents, State University and Community College System, Tennessee, be implemented, from which Order an appeal was also taken by these Petitioners, is not reported but is included in the Appendix at 78a.

The Opinion of the United States Court of Appeals for the Sixth Circuit in Appeals Nos. 77-1622 and 77-1624, which are companion cases to the Appeals filed by these Petitioners, is not yet reported but is included in the Appendix at 83a.

The Opinion of the United States Court of Appeals for the Sixth Cirucit, rendered on April 13, 1979, affirming the District Court's action in ordering a merger of these two institutions, is not yet reported but is included in the Appendix at 102a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 13, 1979. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254 (1).

QUESTIONS PRESENTED

I.

Whether the mere continued existence of a numerical predominance of black students among the student body of Tennessee State University, an institution of higher education which exists within a freedom of choice system, is per se violative of the requirements of the United States Constitution?

II.

If the continued existence of a predominantly black institution of higher education, 19 years after the elimi-

nation of all racial criteria for admissions, does violate the requirements of the United States Constitution, what affirmative measures are appropriate for, or required of, higher education officials in eliminating racial predominance in a single institution within the context of an educational system in which students have a free choice with respect to the institution which they will attend; and, further, have the requirements of the Constitution been met in this case?

III.

Did the District Court and the Court of Appeals err in applying a different standard for "dismantling the dual system" to the Nashville area and The University of Tennessee, in particular, from that applied to the state-wide system of higher education?

IV.

Absent an express finding by the District Court that these Petitioners have been guilty of Constitutional violations in their establishment of and operation of The University of Tennessee at Nashville, and in the light of express findings to the contrary, does imposition of what the District Court itself termed the "radical" remedy of eliminating The University of Tennessee at Nashville as an existing institution violate the principles of *Milliken v. Bradley* (I and II) and other decisions of this Court regarding proper remedies?

V.

In view of all relevant circumstances, is the merger of The University of Tennessee at Nashville and Tennessee State University a proper remedy for the Constitutional violations found to exist by the Courts below?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following Constitutional provisions and statutes, the text of which is set forth in the separate Appendix filed with this Petition, are involved in this case:

(a) Fourteenth Amendment, United States Constitution;

(b) Tennessee Code Annotated §49-1209;

(c) Tennessee Code Annotated §49-3213;

(d) Tennessee Code Annotated §49-3236;

(e) Tennessee Code Annotated §49-3239;

(f) Tennessee Code Annotated §49-3352;

(g) Tennessee Code Annotated §49-4208;

STATEMENT OF THE CASE

This Petition seeks review of the decision of the United States Court of Appeals for the Sixth Circuit, rendered on April 13, 1979, affirming the decision of the United States District Court for the Middle District of Tennessee in ordering that The University of Tennessee at Nashville, an institution of higher education in Nashville, Tennessee, (hereinafter referred to as UTN), be merged into Tennessee State University, (hereinafter referred to as TSU), another institution in the same city, for the purpose of correcting a continued black predominance at the latter institution. UTN is an institution of limited role and scope which is engaged almost exclusively in providing educational opportunities for working adults at night. TSU, on the other hand, is a comprehensive institution of higher education offering a broad graduate and undergraduate curriculum, whose student body is drawn primarily from the traditional college age group

and which offers classes almost exclusively during daytime hours.

UTN is part of an entirely separate system of higher education from that to which TSU belongs. It is administered and operated by the Petitioners, the Board of Trustees of The University of Tennessee. The University of Tennessee system is established as a separate school system by State law. Tennessee Code Annotated Section 49-4208. UTN is the only institution in the Middle Tennessee area which is part of The University of Tennessee system.

TSU is administered by the Respondents, the Board of Regents, State University and Community College System, which, pursuant to State law, administers three other universities and several community colleges in the Middle Tennessee area as well as institutions of higher education in other parts of the State. Tennessee Code Annotated Sections 49-3236 and 49-3239.

This action was filed in 1968, at a time when the University of Tennessee was planning to expand its Nashville Center, later UTN, and, to that end, to construct a new physical plant in downtown Nashville. The jurisdiction of the District Court was invoked pursuant to 28 USC §§1331, 1343 and 42 USC §1981, et seq. At that time, the Plaintiffs sought injunctive relief against the construction of that facility on the ground that the expansion of the Nashville Center would impede the desegregation of TSU (then known as Tennessee A & I State University). Subsequently, the United States intervened, supporting the request for an injunction and asking that the State of Tennessee be required to formulate a plan for the desegregation of its system of higher education.

After an evidentiary hearing, the District Court, in its original decision in this case, while holding that the previously existing dual system of higher education, as primarily manifested by Tennessee A & I State University, had not been dismantled and requiring the formulation of a desegregation plan, further observed that the State institutions were pursuing open-door policies and had been for a number of years and held that State officials had not been guilty of "Constitutionally impermissible acts" either presently or in the recent past. The Court further held that the school administrators were apparently doing "what is in their individual powers to do to integrate their institutions" and that continued segregated enrollments were a problem "not of their making." *Sanders v. Ellington,* 288 F.Supp. 937, 940, 941, 942 (M.D. Tenn. 1968).

The injunctive relief being sought was denied because the Court held that it could not "find that the proposed construction and operation of the University of Tennessee at Nashville Center will necessarily perpetuate a dual system of higher education" but, instead, the Court opined that "this additional educational facility in the Nashville area may play a part in the furthering of a unitary system." *Id.* at 941. After reviewing its findings regarding the valid and necessary educational purposes for which the University of Tennessee at Nashville Center had been created and which it had served and the reasons why it was expanding, the Court, in summary, found that "in its expansion program for the Nashville Center, the University of Tennessee seeks only to provide a quality continuing education and public service center for Nashville and Middle Tennessee with overwhelming emphasis being placed upon the provision of educational

opportunity for employed persons of all races who must seek their education at night." *Id.*

In 1972, the Court rendered a further Opinion in this matter in which it first observed that there had been a rather dramatic 42.2% increase in the number of black students enrolled in public institutions of higher education within the State of Tennessee between the academic years of 1968-1969 and 1969-1970, and, accordingly, observed that "with the exception of the situation at Tennessee State, substantial progress was made on a state-wide scale in attracting members of the Negro race to the public institutions of higher education in Tennessee." *Geier v. Dunn,* 337 F.Supp. 573, 575 (M.D. Tenn. 1972). Accordingly, the Court held that the dual system of higher education was being dismantled on a state-wide basis at a Constitutionally permissible rate of speed but, nevertheless, found fault with the continued black predominance of TSU which, as of the date of that Opinion, was still 99.9% black. Based solely upon its finding that the increase in the number of black students attending formerly predominantly white institutions had not been met by a corresponding increase of white students at TSU, the District Court ordered that steps be taken to establish a "white presence" at that institution. *Geier v. Dunn, supra,* at 581.

Subsequently, in a 1974 Opinion, the District Court ordered that the graduate education program which had previously been offered at UTN be taught only at TSU in the future.

In September and October of 1976, the District Court held a further evidentiary hearing in this case. At that time, there had been a very marked improvement in the integration of faculty and staff at UTN, TSU and the

entire state-wide system of higher education. The fall 1975 enrollment figures for TSU, which were the latest available accurate figures, showed that its student body, which had been 99.9% black at the time of the 1972 hearing, was then only 85% black with a 12.2% white enrollment (504, 522).[1] The faculty at TSU, which had been 81% black in 1972, was 68.84% black as of fall 1975 (527). The evidence also demonstrated a steady increase in black enrollment at UTN, with that institution's 1976 enrollment figures showing that overall its student body was 14.52% black with the freshman class being 18.5% black, as contrasted to an overall black enrollment of 10.5% in fall 1974 (521, 1647-1648). The percentage of black faculty at UTN had increased from 4.3% in 1974 to 6.9% in 1976. The state-wide system of higher education had also experienced steadily increasing integration, although at a slower pace than that experienced in the Nashville area, with an increase in black enrollment from 4.6% in 1969 to 9.7% in 1975 (without TSU) and an increase in the percentage of black faculty from 1.1% to 3.1% during the same period of time.

Throughout the history of this litigation, the Petitioners and other higher education officials have periodically submitted to the Court plans and reports relative to the efforts being made in the University of Tennessee system and the Board of Regents system to achieve desegregation. On July 31, 1974, pursuant to a prior order of the Court, all of the State Defendants filed a long-range Plan for achieving additional desegregation of public higher education. This Plan was developed by

[1]The record citations set forth in the Statement of the Case portion of this Petition refer to the Appendix filed with the United States Court of Appeals for the Sixth Circuit.

an ad hoc committee appointed by the governing Boards of the two systems, which committee followed the advice of a panel of expert consultants regarding the formulation of this Plan.

The Plan actually filed with the Court specifically addressed the situation in Nashville, providing for the continuance of TSU's operation as a traditional, primarily daytime institution, serving college-age students enrolled on a full-time basis through a wide variety of academic program offerings with a view toward the evolution of that institution into a broader-based, racially integrated university. The Plan contemplated that UTN would continue as an evening school, with substantially narrower program offerings than those provided for TSU, which programs were to be designed primarily to serve working adults who are enrolled as part-time students taking evening classes. The Plan provided specific definitions for the role and scope of each institution, assigned certain exclusive programs to each institution and identified certain areas for the development of joint and cooperative educational activities between the two institutions with a view toward the continued operation of each institution so as to perform its own distinctive educational services in a non-duplicative manner.

In the Opinion which was issued after this hearing, the District Court made no findings that the Petitioners or, for that matter, any officials had been guilty of intentional acts of discrimination. Neither did the Court retract in any way its prior findings regarding the purposes for which UTN had been created and operated. While approving the progress in integration in the statewide system which, indisputably, had been less than that accomplished by UTN, the Court again placed its emphasis upon the continued existence of black predominance

at TSU. Although the functions of these two institutions are entirely different and they draw their students almost exclusively from different population groups (i.e. working adults vs. college age full-time students) the Court, without specifying any basis for such finding other than its hypothesis that, if UTN did not exist, TSU might set up an evening program of its own which would draw from the pool of working adults, found that "the existence and expansion of predominantly white UTN alongside the traditionally black TSU have fostered competition for white students and thus have impeded the dismantling of the dual system." *Geier v. Blanton*, 427 F.Supp. 644, 652 (M.D. Tenn. 1977). While criticizing the lack of success of certain joint and cooperative programs between these two institutions, the Court in no way found or even implied that these programs had not been instituted and carried out in good faith by the officials concerned. On the sole ground that TSU remained a predominantly black, though partially integrated, institution and that UTN was attracting students who might otherwise attend TSU in the event that that institution offered an attractive night-time program for working adults, the Court ordered that the two institutions be merged under the governance of the Board of Regents, State University and Community College System not later than July 1, 1980.

Subsequently, pursuant to an express directive contained in the Court's Judgment, the State Board of Regents filed a Plan for accomplishing the merger of these institutions, which Plan provided that the merger was to take place by July 1, 1979. The District Court declined to rule upon the merits of this Plan, holding a position that it lacked jurisdiction since an appeal had been taken, but nevertheless held that "the Plan

submitted by the Board was timely filed and provides for the merger of the institutions by July 1, 1980. Consequently, it does not violate the Judgment. Absent a stay the Plan should be put into effect." This Order is set out in the Appendix at 78a.

These Petitioners appealed to the United States Court of Appeals for the Sixth Circuit from the District Court's Order that the two institutions be merged and from the Order in which it directed that the Board of Regents' Plan for Merger should be implemented. The Tennessee Higher Education Commission also filed an appeal. In an Opinion written by Judge Lively, which was filed on April 13, 1979, the Court of Appeals affirmed the District Court's actions. Without specifically addressing the question of whether the present existence of an institution of higher education with a student body which is 85 percent black violates Constitutional requirements, the Court placed its emphasis upon the historical failure of State officials to eliminate the dual system of higher education which existed some 19 years previously when all racial criteria for admissions were eliminated. While the Court did not specify exactly what steps are appropriate for eliminating a dual system of higher education where students may freely choose what institution they will attend, it nevertheless concurred in the District Court's apparent finding that, while it is not the province of the Court to determine or specify what steps must be taken to remedy the dual system, whatever measures were necessary had not been taken. Thus, without ever passing upon the question of whether the mere existence of a predominantly black institution of higher education is a Constitutionally deficient situation, the Court held that the District Court did have power to eliminate this situation by ordering a merger

and, further, held that, because of the existence of *de jure* segregation in The University of Tennessee system prior to 1960, the imposition of a remedy against the separate University of Tennessee system was appropriate even though that system had no control over TSU, and its only supposed contribution to the existing black predominance at that institution arose from its own success in providing educational opportunities for working adults of all races at night. In his dissent, Judge Engel opined that the continuing black predominance at TSU is primarily the result of that institution's efforts to retain its identity as a black university and the free choice of black students to attend that institution. Accordingly, Judge Engel expressed the opinion that the majority was in error because the merger remedy was violative of the principles enunciated in ***Milliken v. Bradley***, 418 U.S. 717 (1974), inasmuch as the remedy went beyond the Constitutional wrong found to have been committed by The University of Tennessee and, further, because the remedy imposed would tend to strengthen rather than eliminate segregation in higher education in Tennessee.

It is to have this decision of the United States Court of Appeals for the Sixth Circuit reviewed that these Petitioners pray that the Writ of Certiorari be issued by this Court.

REASONS FOR GRANTING THE WRIT

The questions presented by this case are both substantial and unique. The Constitutional permissibility of the continued existence of a predominantly black institution of higher education and the question of the appropriate duties and respective roles of the Courts and higher education officials with respect to such institutions are matters of the utmost importance. Never before has a

Federal Court ordered the merger or consolidation of two separate and distinct institutions of higher education as a remedy to achieve desegregation in one of those institutions. Whether such action is proper is a question which must be answered definitively, not only because of the effect of the merger remedy upon the lives of the thousands of students, faculty and staff of the two institutions directly affected, but because of the continuing existence of numerous other predominantly black colleges and universities. Since predominantly black institutions of higher education are found in almost all of the "Southern" states, the issues involved in this case have a broad impact. In view of the flaws in the rationale utilized by the District Court and the Sixth Circuit and the irreconcilable conflict between the rationale underlying the decisions of those Courts and principles previously laid down by this Court, the precedent of this case should not be allowed to stand and provide a basis for future decisions on the vitally important issues which it involves.

Additionally, these Petitioners respectfully submit that, in addition to the substantial public importance of the issues involved in this case and the significant errors in the Court of Appeals' decision, the granting of the Writ of Certiorari in this case is appropriate as an exercise of this Court's supervisory authority over the lower Federal Courts inasmuch as, upon examination of the Opinion of the Court of Appeals in this matter, no reasoned conclusion may be drawn other than that that Court has once again declined to apply the teachings of this Court from prior decisions regarding school desegregation to a case brought before that Court. As in two cases recently argued before this Court, ***Dayton Board of Education, et al v. Brinkman, et al*** and ***Columbus Board of Education,***

et al v. Pennick, et al, the Sixth Circuit has clearly deviated from the principles of Constitutional law enunciated by this Court, and such deviation cannot be permitted to stand as the law of this case, particularly in view of its importance to the persons involved and its broad public importance.

I.

THE CONTINUED EXISTENCE OF A PREDOMINANTLY BLACK INSTITUTION OF HIGHER EDUCATION IS NOT UNCONSTITUTIONAL PER SE.

While it is respectfully submitted that the Court of Appeals failed to face this issue squarely, a consideration of the issues involved in this case makes it clear that the decisions below are incorrect unless it is true that the mere existence of a predominantly black institution of higher education within a freedom of choice system is violative of the requirements of the Fourteenth Amendment to the United States Constitution. In view of the District Court's prior findings regarding the non-discriminatory and efficacious motives and purposes behind the operation and expansion of The University of Tennessee at Nashville, the absence from this record of any finding of intentional discriminatory conduct on the part of the Petitioners, the substantial integration of the student body and faculty of UTN (which exceeded that of other State institutions found to be in compliance with Constitutional requirements), and the Court of Appeals' affirmance of the District Court's finding that the statewide system was in compliance with Constitutional requirements, the decisions below simply are not supportable unless the mere existence of a predominantly black institution is impermissible. Unless this proposition is accepted, there is no other basis in the record for the imposition of the merger remedy. It is respectfully sub-

mitted that the approach to this question taken by the Court of Appeals that the District Court acted not upon the mere existence of a predominantly black institution but because of the failure to eliminate such an institution begs the question. Obviously, if a particular situation does not violate the Constitution, state officials are under no obligation to remedy that situation. Thus, this threshold question must be squarely faced and dealt with in the light of controlling precedent and simple logic.

In repeated prior decisions, this Court has held that the simple fact of racial predominance in particular schools within a system is not prohibited by the Constitution. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24, 26 (1971); *Milliken v. Bradley*, 418 U.S. 717, 747, fn. 22 (1974); *Washington v. Davis*, 426 U.S. 229, 240 (1976). This Court has made it clear that a racially disproportionate impact is not sufficient to taint official conduct, but, instead, there must be proof of a racially discriminatory intent or purpose before a Constitutional violation may properly be found. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-2 (1977).

If racial predominance is not a sufficient basis for a finding of a Constitutional violation in the elementary or secondary school context, it necessarily follows that such a situation may not properly provide a basis for a Court's finding of a Constitutional violation in a system of higher education. While the District Court, in its 1972 Opinion, expressly recognized that the existence of freedom of choice is very relevant with respect to the remedy to be imposed upon a system of higher education, inasmuch as it would be improper for the State to instruct a college student regarding what institution he must attend, it is

respectfully submitted that both the District Court and the Court of Appeals failed to recognize that such freedom of choice is also relevant to the question of whether continued black predominance in one institution may properly be found to violate the Constitution. While the educational choices of an elementary or secondary school student are restricted by his or her place of residence and the school zoning policies and other policies adopted by school officials, a student in a system of higher education exercises a free and unfettered choice regarding the institution which he or she will attend. This freedom of choice has historically been an important value in American society, and it is a right with which both the Courts and school officials are and should be reluctant to tamper. In view of the existence of this freedom of choice and the recognized importance of each student's right to select an institution which in his view fits his own particular needs, it is difficult to understand in what meaningful sense Constitutional rights are violated when officials of higher education afford students such a right. In the elementary and secondary school cases the underlying rationale for finding a Constitutional violation is the denial of equal educational opportunities to affected students. Clearly this rationale is not applicable to higher education.

The observation which one is compelled to make upon reviewing the decisions of the lower Courts in this case is that the Courts' finding of a Constitutional violation arises out of a subjective disapproval of the manner in which certain black students within the State of Tennessee have chosen to exercise their freedom of choice. It is respectfully submitted that such an approach crosses the line between a Court's appropriate role of determining whether Constitutional violations exist and formu-

lating appropriate remedies to eliminate those violations and invades the province of both the State and its citizens by substituting the Court's views regarding what institutions particular students should attend for those of the students themselves. One cannot fail to take cognizance of the Orwellian implications of a Court's holding that a student's Constitutional rights have been violated because his educational choices are not those which the Court thinks that he should have made, and the resulting imposition by the Court of a remedy which not only radically alters an existing educational system to force the student to make the choice which the Court thinks he should make, but also restricts the student's choices in the Nashville area by eliminating a specialized institution which primarily provided educational opportunities for working adults in the evening and at night. The adoption of such an approach mandates this Court's review.

As recognized and conversantly discussed by a Three-Judge Court in an Opinion written by Honorable Frank Johnson, Jr. in *Alabama State Teachers Association v. Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. N.D. 1968), there is a fundamental difference in the means which may appropriately be employed by educational authorities in eliminating a previously existing dual system of higher education from those which are appropriate elsewhere, and, accordingly, the Court's analysis of whether the State has discharged its responsibilities with respect to institutions of higher education must necessarily be different from that applied to elementary and secondary school situations. That Court declined to enjoin the construction, in the City of Montgomery, Alabama, of a four-year degree-granting extension of Auburn University, which injunction was sought on the grounds that that institution would compete with the predominantly black Alabama State University located in the same city. While accepting that State authorities have an affirmative duty to dismantle a previously existing dual system of higher education, the Court held that, so long as an institution of higher education is not practicing discrimination and is dealing in good faith with respect to its admission of students and its hiring of faculty and staff, the duty to dismantle has been met. This Court affirmed that decision. 393 U.S. 400.

The reliance placed by the District Court and the Court of Appeals upon this Court's decision in *Green v. County Board of New Kent Co. Va.*, 391 U.S. 430 (1968), as standing for the proposition that utilization of a freedom of choice system in education will not satisfy Constitutional requirements is misplaced for two very fundamental reasons. As the Court in the *Alabama State Teachers Association* case recognized, a free choice is part of the essence of higher education and, further, a consideration of *Green* reveals that the so-called freedom of choice plan before the Court in that case was only a subterfuge. *See Keyes v. School District No. 1*, 413 U.S. 189, 221 (1973).

An additional factor in this case is that, as of the date of the Court of Appeals' Opinion, all racial criteria for admission to colleges and universities in the State of Tennessee had been eliminated for 19 years. In a prior Opinion, this Court aptly summarized the factual analysis to be applied to such a situation in the following language:

> The duty of both the District Court and of the Court of Appeals, in a case such as this, where mandatory segregation by law of the races in the schools has long since ceased, is to first determine

> whether there was any action in the conduct of the business of the School Board which was intended to, and did in fact, discriminate against minority pupils, teachers or staff. *Washington v. Davis, supra.* . . . . If such violations are found, the District Court in the first instance, subject to review by the Court of Appeals, must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such Constitutional violations. The remedy must be designed to redress that difference, and only if there has been a system-wide impact may there be a system-wide remedy. *Dayton Board of Education v. Brinkman*, 97 S.Ct. 2766, 2775 (1977).

There were no findings by the District Court of intentional discrimination by the Defendants with reference to TSU or of any incremental segregative effect arising out of any alleged violations. The decision below therefore does violence to the very carefully articulated rationale of *Dayton.*

II.

IF A CONSTITUTIONAL DUTY TO ELIMINATE BLACK PREDOMINANCE EXISTS, SUCH DUTY HAS BEEN DISCHARGED BY THESE PETITIONERS.

Even if one may assume, for the sake of argument, that a Constitutional violation was present in this case, one should then consider very carefully those measures which are appropriate for, or required of, officials of higher education in eliminating desegregation from institutions of higher education. As the District Court recognized in its 1972 Opinion, "no Court can 'order' a student to confine himself to one college or university instead of another, for, unlike the situation in a system of

elementary or secondary education, such persons are free to leave and go elsewhere as they wish. The lesson is that, when it comes to the disestablishment of a dual system of higher education, a Federal Court *cannot* do what it might do in the realm of lower and secondary education: what works in one system will not work in another." (The Court's Emphasis) *Geier v. Dunn,* 337 F. Supp. at 579. Absent an ability to order a student to attend one particular institution or another, State officials face a very difficult problem in eliminating segregation from higher education. Obviously, the sorts of simple solutions which might be applicable in certain elementary or secondary school situations are not appropriate with respect to higher education. If a simple solution were being sought, the State of Tennessee could have eliminated TSU long ago, made some other provisions for the physical facilities of that university and thereby immediately, by the stroke of a pen, eliminated the dual system by forcing those black students who were then attending TSU to find another institution. Obviously, such a solution, while simple and easy, would not be fair to the students, faculty, alumni, staff and other persons interested in TSU. Any sorts of policies which would require students to attend a particular institution or otherwise limit the educational opportunities which are available to both black and white students would also be unacceptable.

Failing obvious solutions and having received no specific guidelines from the Court regarding what steps might be appropriate to eliminate black predominance at Tennessee State University (the only Constitutional violation found to exist in the State system of higher education), the various State Defendants, including these Petitioners, have, over a period of some eleven

years, submitted various proposals and adopted various plans for increasing racial integration in the State system of higher education. As already set forth, the 1974 plan in this regard provided for a minimization of any competition between The University of Tennessee at Nashville and Tennessee State University and involved a voluntary limitation on the part of these Petitioners of the role and scope of The University of Tennessee at Nashville. While the Court disapproved the results produced by the State's plans, it has never found that these Petitioners or, for that matter, any State Defendants, were not in good faith regarding the submission of these plans or their total effort to eliminate segregation in higher education. It is respectfully submitted that, as set forth in the Statement of the Case portion of this Petition, the progress in integration, particularly during the years between the 1972 Opinion and the 1976 evidentiary hearing, was substantial in view of the clear desire of certain black students to attend Tennessee State University, which problem was expressly recognized by Judge Engel in his dissent.

It is further respectfully submitted that there is a basic internal inconsistency in the findings and opinion of the District Court. Throughout this proceeding, from the initial Opinion in 1968 down to the 1977 Opinion, the Court has consistently found that, with the exception of Tennessee State University, adequate progress was being made in the elimination of segregation from higher education in the State of Tennessee. The only Constitutional violation found to exist in the 1977 Opinion, or in any prior Opinion, was the continued black predominance at Tennessee State University. Despite the fact that the District Court found that the progress of racial integration at predominantly white institutions satisfied

Constitutional requirements and declined even to evaluate the policies and goals contained in the Long-Range Plan with respect to those institutions, *Geier v. Blanton* at 651, the Court nevertheless held that the situation with respect to Tennessee State University and The University of Tennessee at Nashville, each of which had a larger percentage of other race representation and a more rapid rate of increase in other race representation than the overall state-wide figures, constituted a violation of the requirements of the Constitution. No basis for this distinction is apparent from the Court's Opinion, and neither precedent nor logic supports the imposition of one standard with respect to the rate and level of integration to one area and another standard to another area. Even assuming for the sake of argument that a continued racially disproportionate enrollment at institutions of higher education is per se impermissible, there is no basis for the imposition of a more stringent standard for eliminating such racial disproportion to particular institutions from that applied to other institutions. As it did with respect to the question of whether black predominance is a per se violation of the Constitution, the Court of Appeals failed to address specifically whether it was proper to apply to the Nashville area a standard which was clearly different from that applied to institutions of higher education in other parts of the State of Tennessee.

III.

THE IMPOSITION OF A MERGER UPON THE UNIVERSITY OF TENNESSEE AT NASHVILLE AND TENNESSEE STATE UNIVERSITY IS NOT A PROPER REMEDY.

Even if it be conceded, for the sake of argument, that the Court was correct in finding a Constitutional violation, the remedy which it imposed was not reasonably related to the violation which it found to exist, nor was that remedy equitable in view of all of the circumstances. As reaffirmed by this Court in *Milliken v. Bradley*, 433 U.S. 267 (1977), those remedies which Federal Courts impose to eliminate segregation must be formulated on the basis of "equitable principles." In that decision, this Court summarized, from its prior decisions, three factors upon which Federal Courts must focus in applying these "equitable principles." In that Opinion this Court stated as follows:

> In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the Constitutional violation. *Swann v. Charlotte-Mecklenburg Board of Education, supra*, 402 U.S. at 16, 91 S.Ct. at 1276. The remedy must therefore be related to 'the *condition* alleged to offend the Constitution. . .' *Milliken I, supra*, 418 U.S. at 738, 94 S.Ct. at 3124. Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'. *Id.* at 746, 94 S.Ct. at 3128. Third, the Federal Courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. In *Brown II* the Court squarely held that 'school authorities have the primary responsibility for elucidating, assessing, and solving these problems....' 349 U.S. at 299, 75 S.Ct. at 756 (The Court's Emphasis).

The remedy imposed by the District Court and affirmed by the Court of Appeals conforms to none of these three factors .

As already set forth, these Petitioners have no affiliation with, nor control over Tennessee State University. The University of Tennessee system and the Board of Regents system operate as entirely separate entities in accordance with Tennessee law. Tennessee Code Annotated §§ 49-3236, 49-3239, 49-4208. Accordingly, the Court's remedy is being imposed upon educational officials, a school system and the faculty and students of that system who not only have not been found to be guilty of any discriminatory conduct which contributed to the violation found to exist but, further, have had no means of correcting the situation which the Courts below have found to violate the Constitution. Inasmuch as the sole violation found by the Courts below is the existence of Tennessee State University as a predominantly black institution and the only part which these Petitioners have been found to play in that violation is that they have provided educational opportunities which both black and white students have found to be attractive and have taken advantage of, thereby having deprived Tennessee State University of an opportunity which it might or might not have exercised to create a comprehensive night program of its own, these Petitioners respectfully submit that the remedy imposed is neither equitable nor responsive to the violation found to exist. At most, all that the Petitioners can be found to have done is to compete for students, and such competition,

being the life blood of higher education, is certainly not a proper basis for a punitive remedy.

The teaching of *Milliken v. Bradley, supra*, is that a remedy which acts upon a separate school system which has not been found to be guilty of intentional discriminatory conduct against pupils, teachers or staff is impermissible. While the Court of Appeals sought to distinguish between the deference which should be afforded to the existence of separate local public school systems and that which should be given to separate systems of higher education, it is respectfully submitted that no sound basis for such a distinction exists. The creation of separate systems at any level of education represents a very fundamental policy decision by Governmental authorities which should not be ignored, particularly where no improper or discriminatory purpose underlies such decision. Further, it is apparent from the Court of Appeals' decision that the principal basis on which it found the remedy imposed to be appropriate was the existence of *de jure* segregation in the University of Tennessee system prior to 1960. It is submitted that any guilt attributable to these Petitioners arising out of this fact has been purged by their own progress in integrating the University of Tennessee system.

As recognized by Judge Engel in his dissent in the Court of Appeals, the remedy imposed is not responsive to the ill found to exist. A change in the attitudes of the black students choosing to attend Tennessee State University and its faculty and staff are the only means by which the black predominance at that institution may be meaningfully eradicated. Absent such a change, the only realistic expectation from the merger ordered by the Court is that a predominantly black day-time

institution will control a night school which reflects the racial proportions of the Nashville population, a situation which, in no meaningful sense, can be deemed to accomplish the goals sought by the Courts below.

Secondly, it is not possible to concede that the remedy adopted by the Courts below is designed to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." As previously set forth, it is difficult to understand who the "victims" of discriminatory conduct are in this context, nor does the remedy being imposed grant anyone the right which he or she does not already have. Thirdly, the remedy imposed is a fundamental violation of basic principles of Federalism and a profound infringement upon the rights of the Legislative and Executive branches of the Government of the State of Tennessee and The University of Tennessee as a public corporation to organize and carry out higher education programs so as best to serve the citizens of the State of Tennessee.

Inasmuch as the Legislature of the State of Tennessee has recognized the need for and provided funds for a separate and specialized institution to meet the needs of working adults of all races who must seek educational opportunities after their regular working hours, the function which the District Court itself found was that for which The University of Tennessee at Nashville was created, and the Petitioners, the Board of Trustees of The University of Tennessee have set up, organized and operated this institution successfully for many years, it is fundamental infringement upon the right of local authorities to organize their own system of higher education for a Court now to say that the further operation of this institution is improper.

Further, the imposition of this remedy upon a separate system of higher education is analogous to, and repugnant for the same reasons as the cross-district remedy condemned by this Court in *Milliken v. Bradley*, 418 U.S. 717 (1974), and the zoning requirements imposed on junior college students found to be inappropriate in *Lee v. Macon County Board of Education*, 453 F.2d 524 (5th Cir. 1971), 468 F.2d 956 (5th Cir. 1972).

The remedy adopted by the District Court and affirmed by the Court of Appeals is improper. What the Courts below have done is to destroy the rights of students, faculty and administrators of all races to attend or be employed at a specialized institution of higher education providing opportunities at night for educational advancement by working adults, even though the District Court, after its first hearing, found that the expansion of The University of Tennessee at Nashville was not violative of the Constitution and never found, throughout this litigation that, in the operation of The University of Tennessee at Nashville, these Petitioners were guilty of any Constitutional violations. It matters not that an evening program of education may continue to be offered by the merged institution. It will not be operated by The University of Tennessee, and there is no assurance that the evening program offered by the University of Tennessee, which has assembled and is operating a program specially designed to meet the needs and enhance the continuing education of persons of all races who must attend school at night at an institution specially designed to meet their educational needs, will be continued.

Since the District Court decided in 1968 that the proposed expansion of the University of Tennessee at Nashville would not result in Constitutional violations,

and since the University of Tennessee at Nashville has been permitted to continue to exist and serve the specialized needs of its student body during the long course of this litigation and has performed these functions without committing any discriminatory acts, basic principles of equity are violated by the Court's merger order eliminating The University of Tennessee at Nashville, solely on the basis that its continued existence and expansion "have fostered competition for white students and thus have impeded the dismantling of the dual system." *Geier v. Blanton, supra*. Such a result, rather than being in accordance with the equitable principles governing remedies imposed by a Federal court, runs directly contrary to such principles.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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